83-86

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MCDONNELL DOUGLAS CORPORATION,
Petitioner,

v.

NORTHROP CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GEORGE S. HECKER
(Counsel of Record)
CHARLES A. WEISS
E. PERRY JOHNSON
DANIEL C. SCHWARTZ
BRYAN, CAVE, MCPHEETERS & MCROBERTS
500 North Broadway
St. Louis, Missouri 63102
(314) 231-8600
Attorneys for Petitioner

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

1. In light of *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972), *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980), and *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 102 S. Ct. 2466 (1982), did the Ninth Circuit properly determine that a market division, historically held to be *per se* illegal, should nonetheless be subjected to a rule-of-reason analysis because the market division allegedly had some procompetitive effects, and neither the military aircraft industry nor teaming agreements effecting such a market division had been previously examined by the courts in a Sherman Act context?

2. Inasmuch as (a) the United States Government owns "unlimited rights" in the data and technology of the F-18 aircraft, which was designed and developed at its instance and expense, and controls who can produce and sell and who can buy and use the aircraft, and (b) the availability of the aircraft is vital to the Government's national defense and foreign policy interests, is the Government an indispensable party to this suit in which a contractor seeks determinations as to who can produce and sell F-18's to the Government for its own use or directly or indirectly through the Government for use by its allies, and in what configurations?

3. Is this suit, which requires judicial inquiry into the decisions of the Legislative and Executive Branches of the Government concerning the production, sale, purchase and use of the F-18 by or for the Government and its allies, and into the motivations of military procurement decisions of foreign states, nonjusticiable by reason of the political question and act-of-state doctrines?

4. Can a prime contractor unlawfully attempt to monopolize a military air weapons system market in which the production, sale, purchase, and use of the product are controlled by the Government?

STATEMENT REQUIRED BY RULE 28.1

This Petition is filed on behalf of McDonnell Douglas Corporation, which has no parent companies. It has direct or indirect equity interests in the following companies (in addition to its wholly owned subsidiaries):

American Monitor Corporation
Arinc, Incorporated
Coaliquid, Inc.
Coaliquid International, B.V.
Coaliquid International, Inc.
Coaliquid International, Ltd., N.V.
Excalibur Technologies Corporation
Muse Air Corporation
Nitron, Inc.
PSA, Inc.
Republic Airlines West, Inc.

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OPINION BELOW

The opinions of the Court of Appeals are published at 700 F.2d 506 and, as modified, at 705 F.2d 1030; the modified opinion is reproduced at p. 3a of the Appendix ("App.") hereto. The District Court's opinion published at 498 F. Supp. 1112, orders, and findings of facts and conclusions of law, which the Ninth Circuit reversed, appear at App. pp. 53a, 76a, 79a, 121a, 123a.

JURISDICTION

The Ninth Circuit's judgment and opinion was filed on February 28, 1983 (App. pp. 2a, 3a). A timely petition for rehearing and suggestions for rehearing *en banc* were denied by a June 10, 1983 order, a copy of which appears at App. p. 1a. This petition for certiorari is filed within 90 days thereafter. Jurisdiction of this Court is founded upon 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following statutory provisions, regulations and rules are involved, all of which are set out at App. pp. 127a-132a: (1) Sherman Act, §§ 1 and 2, 15 U.S.C. §§ 1 and 2; (2) Defense Acquisition Regulation ("DAR") 4-117, 32 C.F.R. § 4-117; (3) DAR 9-201(d), 32 C.F.R. § 9-201(d); (4) DAR 9-301.2, 32 C.F.R. § 9-301.2; and (5) Rule 19, Fed. R. Civ. P.

STATEMENT OF THE CASE

A. Introduction

The subject of this precedent-setting action is this Nation's newest and most advanced aircraft weapons system, the F-18.

McDonnell Douglas Corporation ("McDonnell") is the prime contractor for the United States ("Government"), and Northrop Corporation ("Northrop") is McDonnell's principal subcontractor for the F/A-18A. The F/A-18A is the only F-18 which has been developed and is being produced. It is being procured from McDonnell by the Government for the U.S. Navy and the Air Forces of Australia and Spain and, with the

permission of the Government, by Canada for its Air Force. With the Government's preliminary approvals, Greece and Turkey, among others, are also considering procuring the F/A-18A.

Northrop initiated this suit to enforce its claim of exclusive rights to produce and sell (a) F-18's of any configuration for the U.S. Air Force, and (b) F-18's of any configuration for the Navy and foreign governments, other than the carrier suitable configuration being procured from McDonnell by the Navy for its own use—all in derogation of the Government's rights to make such determinations. Northrop admits that the Government has *bought* and *obtained from Northrop and McDonnell "unlimited rights"* in its data and technology.

Under any yardstick, the case involves questions of exceptional importance affecting the defense and foreign policy of the United States. The Ninth Circuit opinion, reversing the District Court decision, has, *inter alia*, the following consequences:

> (1) it sanctions agreements of private contractors which divide between themselves U.S. Air Force and Navy customers and, on product specific bases, all customers, in contravention of this Court's holdings in *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972), *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980), and *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 102 S. Ct. 2466 (1982);
>
> (2) it emasculates the "unlimited rights" purchased by the Government to freely disclose in any manner and for any purpose whatsoever, and to freely use or have or permit others to use, F-18 data and technology, by effectively precluding the Government from exercising those "unlimited rights" to purchase or permit foreign governments to purchase F-18's from McDonnell as the Government determines to be in the interest of national defense and foreign policy;
>
> (3) it annuls DAR 4-117 (App. p. 130a), which proscribes "teaming arrangements" which (a) are in violation of the antitrust statutes, or (b) limit the Government's rights to "provide the selected prime contractor with data

rights, owned or controlled by the Government" or to "pursue its policies on competitive procurement, subcontracting, and component breakout";

(4) it thrusts the judiciary into political questions and motivations behind acts of states which are inextricably entangled in this case; and

(5) it decides for the first time that a prime contractor could attempt to monopolize an advanced military air weapons system market which the Government controls.

B. Facts

1. Northrop's Commencement Of This Action

Northrop initiated this suit on October 26, 1979, with a three-count Complaint for a declaratory judgment and an injunction seeking:

(a) to preclude McDonnell from:

(i) producing and selling or offering to sell any F-18 to or for the U.S. Air Force;

(ii) producing and selling or offering to sell to the U.S. Navy any F-18 which is not "carrier-suitable";

(iii) producing and selling or offering to sell, directly or indirectly through the Navy for use by foreign governments, any F-18 which does not conform to the carrier-suitable F-18 configuration being purchased by the Navy; and

(b) to require McDonnell to subcontract certain F-18 work to Northrop on Northrop's unilaterally established terms and conditions, and to preclude McDonnell from subcontracting the work to others even if Northrop refused to do it.

After the District Court denied Northrop's motion for a preliminary injunction on December 3, 1979, Northrop filed an Amended Complaint (App. p. 147a) adding five counts alleging, respectively, fraud in the inducement, breach of fiduciary duty, attempted monopolization, unfair competition and *quan-*

tum meruit theories. In these counts it seeks essentially the same declaratory and injunctive relief, as well as damages.

Underpinning all eight Counts is Northrop's construction of the parties' October 2, 1974 Teaming Agreement (App. p. 132a) and June 27, 1975 Basic Agreement (App. p. 134a) and its contention that McDonnell has breached the Basic Agreement as so construed.[1] Under its construction, for which it seeks judicial sanction, Northrop claims that Northrop and McDonnell divided the market for F-18 aircraft such that Northrop would have the exclusive right to produce and sell all F-18's other than (a) carrier-suitable F-18's for the use of the Navy, and (b) F-18's for foreign customers of the same carrier suitable configuration as that being purchased by the Navy for its own use, which F-18's McDonnell would have the exclusive right to sell.

Northrop contends that this market division and the other "license" restrictions it seeks to impose on McDonnell (and *ipso facto* the Government) are justified by its alleged "proprietary rights" in YF-17 prototype and F-17 proposal data and technology and its earlier P-530 and P-630 paper designs which Northrop alleges it incorporated into the YF-17. It contends it "licensed" such data and technology to McDonnell under the Basic Agreement for use in designing the F-18.

2. The Teaming Agreement

In 1972 the Government awarded both Northrop and General Dynamics multimillion-dollar prime contracts independently to develop and build prototype demonstrators for the Air Force's Lightweight Fighter Technology Demonstration (la-

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[1] Northrop admits that while it alleges different theories in the various counts, "virtually the same operative facts underlie each of Northrop's causes of action." As the Ninth Circuit itself recognized, "The conduct and relief at issue in Counts 4-8 overlap and are inextricably intertwined with that in Counts 1-3." 705 F.2d at 1039. *See also* District Court's Finding of Fact 9, App. p. 82a.

ter called the Air Combat Fighter, "ACF") Program. The Northrop and General Dynamics prototypes were denominated, respectively, the YF-17 and YF-16. Northrop and McDonnell entered into the October 2, 1974, Teaming Agreement after Congress, in September, 1974, directed that the Navy, in its proposed Naval Air Combat Fighter ("NACF", earlier called VFAX) program, make use of the YF-17 and YF-16 data and technology already bought by the Government.

Because neither the YF-17 nor the YF-16 met the Navy's VFAX requirements, and because neither Northrop nor General Dynamics had the experience to satisfy the Navy's requirements, the Government requested that both contractors enter into teaming arrangements pursuant to DAR 4-117 with companies which possessed the necessary experience and capabilities to design and build Navy aircraft.

In the two-page 1974 Teaming Agreement the parties simply agreed "to team for the purpose of developing, proposing and producing a USAF derivative of the YF-17 (USAF ACF) and a carrier-suitable version of the YF-17 (USN ACF) to satisfy U.S. Navy VFAX requirements." (App. p. 132a.) McDonnell was to be prime contractor on the NACF. The roles were to be reversed for the Air Force's ACF and for foreign variants of that aircraft. During the term of the Teaming Agreement, as requested by the Government and in performance of Northrop's F-17 proposal prime contract, Northrop provided the YF-17 and F-17 proposal data and technology to McDonnell without restriction for its use in designing an NACF aircraft.

3. The Basic Agreement

The Basic Agreement (App. p. 134a) was entered into by the parties after the January, 1975 Air Force selection of General Dynamics' proposed F-16 over Northrop's proposed F-17 for the Air Combat Fighter and after the Navy's May, 1975 selection of McDonnell's proposed F-18 for its Naval Air Combat Fighter.

The Basic Agreement, by its terms, superseded the earlier teaming agreement. In it, the parties agreed to:

> work together (without in any manner intending to create a joint venture or otherwise incur or employ joint or several liability) for the purpose of obtaining and performing contracts for the development and production of derivatives of YF-17 aircraft that are responsive to the requirements of the U.S. Navy and foreign customers.

At the heart of the Basic Agreement are paragraphs 3 and 5:

Paragraph 3, "*Contract Responsibilities*," provided that McDonnell would be prime contractor for contracts for development and production of F-18 aircraft purchased by the Navy for its own use and for contracts for sale directly or indirectly through the Navy to foreign customers of F-18's of "basically the same configuration." It provided that Northrop could elect to be prime contractor for the development and production of other aircraft derived from the *YF-17*. (App. pp. 134a-135a.)

Paragraph 5, "*Division of Effort*," described how the work was to be divided under the contemplated McDonnell prime contracts, expressly recognizing the right of the Government—which Northrop now disregards—to direct otherwise. (App. pp. 135a-136a.)

The Basic Agreement does not purport to override any of the Government's rights. DAR 4-117.

4. Government's Procurement Of Unlimited Rights In All YF-17 (Including P-530 and P-630) and F-18 Data and Technology

It is an admitted fact that (a) under the Government's F-18 prime contracts with McDonnell, (b) through Northrop's F-18 subcontracts from McDonnell under those prime contracts, and (c) under the Government's previous YF-17 prototype and F-17 proposal prime contracts with Northrop, the Government has obtained "unlimited rights" in all of the data and technology of (a) the YF-17 prototype and F-17 proposal (including the incorporated P-530 and P-630 designs of Northrop) and (b) the F-18. The Government therefore has the right and means to freely disclose this data and technology for any purpose and to

freely permit its use by any contractor.[2] And, as the District Court and the Ninth Circuit recognized, the Government authorized McDonnell's use of all applicable YF-17 data in connection with the F-18 program. (705 F.2d at 1036; Finding of Fact 40, App. p. 92a.)

5. Government's Control Of Production, Sale, Purchase And Use Of The F-18

Even if, *arguendo*, McDonnell's alleged breaches of the Basic Agreement as construed by Northrop did occur, the unalterable, ultimate fact is that the Government controls who can produce and sell and who can buy and use the F-18.

Neither the Government nor any foreign government has selected Northrop's proposed land-based F-18's, denominated "F-18L's". The record and the Government's plenary control, by law, over advanced air weapons systems belies Northrop's claim that McDonnell's acts, rather than decisions of the Government and of foreign governments, have affected Northrop's efforts to sell F-18L's. For example:

—The Government refused to permit Northrop to release information on a proposed F-18L to any foreign country until the Navy, McDonnell, and Northrop jointly developed, and the Department of Defense approved, a detailed Foreign Military Sales Master Plan which assured that its development would not adversely impact the Navy's F/A-18A program.[3]

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[2] In the District Court, Northrop initially challenged the Government's unlimited rights. After McDonnell's motion to dismiss, Northrop told the court that "Northrop does not allege—*for purposes of this action*—that the Government does not have unlimited rights to use YF-17 F-18A technical data." *See, e.g.*, 498 F. Supp. at 1117 n. 4.

[3] As a result of the Government's requirement for Foreign Military Sales Master Plans, McDonnell and Northrop entered into a third agreement on August 26, 1976. (App. p. 141a.) In that agreement, Northrop elected to design, develop, and produce aircraft derived from the YF-17 "designed *only* for land-based operations." The agreement specifically stated that "the foregoing election by [Northrop] is not in derogation of McDonnell's rights under the Basic Agreement." (Emphasis added.)

—President Carter's administration refused to permit the sale of the F-18L to Iran.

—President Carter's Directive No. 13 ("PD-13") declared that arms transfers would be viewed "as an exceptional foreign policy implement, to be used only in instances where it can be clearly demonstrated that the transfer contributes to our national security interest," and precluded export to non-exempt countries of advanced weapons not operationally deployed with U.S. forces or which were significantly modified solely for export. The then proposed F-18L fell within both these categories.

—Canada, exempted from PD-13, eliminated a Northrop proposed F-18L in its selection of a new fighter aircraft, stating that it was unwilling to assume the risks of (a) buying an aircraft not in the service of any other country, (b) involvement in the development and initial production of the plane, and (c) a delivery schedule later than it required.

—Additionally, Belgium, the Netherlands, Denmark, Norway, Australia, Spain, Turkey and Greece have eliminated F-17/F-18L's in selecting their next generation advanced air weapons systems from among those competing in the world market.

6. District Court Proceedings

After nearly a year of extensive discovery, affidavits, briefs and numerous hearings, the District Court dismissed Northrop's First Amended Complaint and McDonnell's Counterclaim, which it viewed as a mirror image of the Amended Complaint, on the grounds, among others, that the Government was an indispensable party, that the political question and act-of-state doctrines rendered the matter nonjusticiable, that the Basic Agreement as Northrop sought to have it construed was a *per se* illegal division of markets under the Sherman Act, and that McDonnell could not have the power to monopolize the market which the Government controls.

7. **Proceedings On Appeal**

The Ninth Circuit disagreed and reversed each of the District Court's holdings.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. The Ninth Circuit's Determination That An Obvious Market Division Should Be Subjected To A Rule-Of-Reason Analysis Under The Sherman Act Because Neither The Military Aircraft Industry Nor Teaming Agreements Have Received Judicial Scrutiny In A Sherman Act Context Is Repugnant To This Court's Decisions In *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 102 S.Ct. 2466 (1982), And *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972).

Within the past three years, this Court twice has admonished the Ninth Circuit that a rule-of-reason analysis is not to be applied to a *per se* violation of the antitrust laws. *Catalano, Inc.* v. *Target Sales, Inc.*, *supra*; and *Arizona* v. *Maricopa County Medical Society*, *supra*.

Despite this clear and controlling precedent, the Ninth Circuit in this case persisted in attempting to apply a rule of reason to a practice which has uniformly been held to be *per se* illegal—a division of markets between competitors. The District Court had found that:

> The Basic Agreement and the August 26, 1976, Agreement, as Northrop would have this court construe and enforce them, constitute an allocation of markets between horizontal competitors, *per se* violative of Section 1 of the Sherman Act. Under Northrop's interpretation of those agreements, McDonnell is limited to selling F-18's only to the United States Navy for its own use, and then only if fully equipped for use from carriers and to selling to or for the use of foreign countries, either directly or through the United States Government, F-18 aircraft that are both carrier-suitable and conform to the configuration and structure of F-18 aircraft being purchased by the Navy for its own use, while Northrop is allocated the exclusive right to all other F-18 marketing opportunities, including the exclusive right to all Air Force sales, even in the exact Navy configuration.

Conclusion of Law 45, App. pp. 112a-113a.

Despite this naked allocation of customers, the Ninth Circuit reversed the District Court and held that a rule of reason rather than a *per se* test must be applied to the agreements because (a) "[w]e find no significant judicial rule-of-reason experience with either the particular practice or industry at issue here. . . .," 705 F.2d at 1051-1052, App. p. 37a; and (b) "[w]here the effect on competition is equivocal, it is appropriate to examine the purpose of the restraint in deciding whether to apply the *per se* rule," 705 F.2d at 1053, App. p. 39a.

Accordingly, the Ninth Circuit would remand the case for exactly the kind of "elaborate inquiry into the reasonableness" of the agreement which in the end "may provide little certainty or guidance about the legality of a practice in another context. . . .", and even though both juries and "[j]udges often lack the expert understanding of industrial market structures and behavior to determine with any confidence a practice's effect on competition." *Arizona* v. *Maricopa County Medical Society*, 102 S. Ct. at 2472-73 (1982) (citations omitted); *United States* v. *Topco Associates, Inc.*, 405 U.S. at 609-10.

The Ninth Circuit's unsupported industry rationale simply cannot be squared with *Maricopa County Medical Society* where this Court stated:

> We are equally unpersuaded by the argument that we should not apply the *per se* rule in this case because the judiciary has little antitrust experience in the [particular] industry . . ., [T]he argument that the *per se* rule must be rejustified for every industry that has not been subject to signficant antitrust litigation ignores the rationale for *per se* rules, which in part is to avoid "the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved. . . ."

102 S.Ct at 2476. Equally contrary to *Maricopa County Medical Society* is the Ninth Circuit's view that the judiciary has had no antitrust experience with teaming agreements and that to condemn teaming agreement market divisions would create a *new per se* rule. No *new* rule is at issue.

Horizontal market division, like price fixing, has been held by this Court to be a practice "unlawful in and of [itself]," *Maricopa County*, 102 S. Ct. at 2473 n.15; *United States* v. *Topco Associates, Inc.*, *supra*. As the Fifth Circuit recently observed in *Affiliated Capital Corp. v. City of Houston*, 700 F.2d 226, 236 (5th Cir. 1983): "Such agreements have been classified as naked restraints of trade. A long line of cases stretching back to the nineteenth century has so condemned market division. [citations omitted]."[4] There is no reason why agreements which allocate customers should be any less condemned simply because they may take the form of teaming arrangements or occur in the military aircraft industry. This is particularly true when the purpose of Northrop's desired market division is to limit competition so that Northrop can sell an F-18L at prices substantially higher than McDonnell's F/A-18A.[5]

Despite the Ninth Circuit's effort to distinguish the horizontal market division sought by Northrop from the "run-of-the-mill . . . market allocation between customers," 705 F.2d at 1051, it cannot conceal the fact that Northrop is seeking to prevent McDonnell from selling any F-18 to the U.S. Air Force and from selling certain versions of the F-18 even to the U.S. Navy and to it for, or with the Government's permission directly to, foreign customers.[6] The anticompetitive effects are self-evident.

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[4] It makes no difference whether the agreement between McDonnell and Northrop is characterized as a division of *markets* or of *customers*. *United States* v. *Topco Associates, Inc.*, 405 U.S. at 612 (striking down "restrictions [that] amount to regulation of customers to whom members of Topco may sell Topco goods"); *United States* v. *Consolidated Laundries Corporation*, 291 F.2d 563, 574 (2d Cir. 1961) ("We fail to see any significant differences between an allocation of customers and an allocation of territory.")

[5] As Northrop argued before the District Court:

> "[T]he only way that the [F-18]L can ever compete . . . is for it to have some unique advantage that will allow it to compensate for the fact that it's going to cost more for awhile."

[6] Northrop argues that the market division is a reasonable ancillary restraint to its alleged *retroactive* Basic Agreement "license" of "proprietary" data provided to McDonnell under the Teaming Agreement. Neither the

The Ninth Circuit's acceptance of Northrop's unfounded allegation that the Basic Agreement could be justified as procompetitive was rejected by this Court in *Maricopa County Medical Society*, where it held:

> The respondents' principal argument was that the *per se* rule was inapplicable because their agreements are alleged to have procompetitive justifications. The argument indicates a misunderstanding of the *per se* concept. The anticompetitive potential inherent in all price fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some.

102 S. Ct. at 2477.[7] See also *United States* v. *Topco Associates, Inc.*, 405 U.S. at 610 ("[T]he Court has consistently rejected the notion that naked restraints of trade are to be tolerated because they are well intended or because they are allegedly developed to increase competition.").

If the Supreme Court fails to accept certiorari in this case, and fails to summarily reverse the Ninth Circuit's decision and reinstate the District Court's Order, this Court's holdings in

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District Court nor the Ninth Circuit gave much weight to Northrop's contention. The District Court found that the agreements were not "licenses" (498 F. Supp. at 1122, Findings of Fact 27 (App. p. 88a) and 35 (App. pp. 90a-91a) and Conclusions of Law 51 and 52 (App. pp. 114a-115a)), but even if they were, they could not justify the restrictions imposed by Northrop under its interpretation of the agreements. (Conclusions of Law 55 and 56, App. pp. 115a-116a.) The Ninth Circuit recognized that "Northrop's licensing theory alone is probably an insufficient reason to require rule-of-reason analysis . . ." 705 F.2d at 1054, App. p. 41a.

[7] The Ninth Circuit also incorrectly relies on *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979). There, as the Court in *Maricopa County* pointed out, the blanket license considered "did not place any restraint on the right of any individual copyright owner to sell his own compositions separately to any buyer at any price." 102 S. Ct. at 2479 (Citation omitted). In contrast, Northrop seeks to strictly limit McDonnell both as to the customers to which McDonnell may sell and the products (in terms of configuration) McDonnell may sell. *See Board of Regents* v. *NCAA*, 1983-1 CCH Trade Cas. ¶ 65,366 at 70,192 (10th Cir.) (restrictions imposed in *Broadcast Music* substantially less restrictive than television broadcasting restrictions imposed by NCAA because copyright holders could sell outside the blanket licensing arrangement imposed in *Broadcast Music*).

Maricopa County Medical Society and *Topco* will have been transgressed, and exhaustive, wasteful, and further ultimately pointless litigation will be required.

II. The Government Is An Indispensable Party To This Action In Which Northrop Seeks To Restrict The Government's Use Of Its "Unlimited Rights" In F-18 Data As The Government Determines To Be In The Interest Of National Defense And Foreign Policy

If it could be held that the District Court abused its discretion in determining that the Government is an indispensable party to this action involving its rights and vital national defense and foreign policy interests in the F-18, Rule 19 would be reduced to a nullity.*

As the District Court correctly found:

> Procurement of the design, development and production of weapons systems for the defense of the nation is a governmental function peculiarly left to an amalgam of executive and legislative powers. In the exercise of those plenary powers the Government—subject only to self-imposed limitations—has the right to designate the who, what, when and where of weapons systems production. When that right can be called into question by a Court in what *cosmetically* is a dispute between private parties, the United States Government comes within the considerations of indispensability delineated by Rule 19, F.R.Civ. P. (Emphasis added.)

498 F.Supp. at 1117, App. pp. 60a-61a.

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* The Ninth Circuit panel's decision violated the Ninth Circuit's own teachings in *Bakia* v. *County of Los Angeles*, 687 F.2d 299 (9th Cir. 1982) and *Walsh* v. *Centeio*, 692 F.2d 1239 (9th Cir. 1982). Completely disregarding the District Court's detailed findings of fact and conclusions of law, it impermissibly substituted its own discretion for that of the District Court. Indeed, the decision as initially filed made no mention of *Bakia* and *Walsh*. After the decision, petitioner pointed to this flaw, and the panel amended its opinion in a transparent attempt to correct the error which remains apparent on the face of the decision. (App. p. 52a.) Compare 700 F.2d at 518-19 with 705 F.2d at 1043.

The Ninth Circuit's opinion, in the absence of the Government, has circumscribed the admitted "unlimited rights" of the Government not only in YF-17 and F-18 data, but also in all "unlimited rights" data which the Government has acquired or may in the future acquire in any weapons system. This is precisely what Rule 19 was designed to prevent.

The Ninth Circuit states that, if McDonnell used "YF-17 derivative data" (i.e., F-18 data under Northrop's construction), and if such use "violated [McDonnell's] antecedent promises to Northrop", McDonnell would be liable to Northrop, notwithstanding McDonnell's reliance on the Government's unlimited rights in that data. 705 F.2d at 1045. Without consideration of the injunctive relief Northrop actually seeks, *this holding, qualifying McDonnell's use of the Government's unlimited rights data, is no less a restraint on the Government's rights to "use . . . or disclose . . . in any manner and for any purpose whatsoever . . . and to have or permit others to" use the data (DAR 9-201(d)) than an order directly against the Government prohibiting such disclosure to or use by McDonnell. The effect is the same.*[9]

The Ninth Circuit's opinion, brushing aside the Government's indispensability in finding neither of the alternative requisites of Rule 19(a) were present here, is grossly erroneous. The Ninth Circuit in dealing with the first factor of Rule 19(a) confused "complete relief," which cannot be accorded absent the Government, with "meaningful" relief. It simply *ignored* the District Court's specific finding that any judgment granting Northrop's requested relief cannot be complete or adequate because it would not bind the Government. (Conclusion of Law 15, App. pp. 103a-104a.)

In sweeping aside the second factor of Rule 19(a), the Ninth Circuit incredibly and impermissibly *assumed* from the

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[9] *See also* DAR 9-202(b)(1), Government shall acquire "unlimited rights in data resulting from performance of "experimental, developmental or research work"; and 9-202.2(e) which implicitly confirms a prime contractor's right to use subcontract "unlimited rights" data, as any other person to whom data is disclosed.

Government's absence—from a suit in which it could not be joined—*that the Government has no protectable interest.* First, Rule 19 does not require the indispensable party to assert a legally protected interest. The absence of a party is the reason for the existence of Rule 19. It is fundamental that:

> The test, therefore, in the determination of whether an action is one against the United States, is *not determined by the named parties but is determined by the relief sought and the results of any judgment or decree which might be entered pursuant thereto.* (Emphasis added.)

Ogden River Water Users' Assn. v. *Weber Basin Water Conservancy*, 238 F.2d 936, 941 (10th Cir. 1956).

Second, it is plainly wrong to hold that the Government, which has spent billions of dollars to develop and acquire the design data and technology of the F-18 and to bring it into production, with McDonnell as prime contractor, for use as an implement of national defense and foreign policy (see pp. 1-2, 7-8, *supra*) has no claimed interest in the F-18.

Not only does the Government have an interest in the F-18 within the meaning of Rule 19(a)(2), but the relief requested by Northrop "may (i) as a practical matter impair or impede [the Government's] ability to protect that interest or (ii) leave [McDonnell] subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of [the Government's] claimed interest."

Despite Northrop's ambivalent representations concerning the injunctive and damage relief it seeks, the determination of *any* of Northrop's claims or the grant of *any* of Northrop's requested relief will inescapably impact the Government's rights in the F-18. While such relief would not be against the Government, *it would immediately* and severely constrain the scope and affect the exercise and value of the Government's rights, notwithstanding the fact that the Government has paid Northrop more than two billion dollars as YF-17 prime contractor and F-18 subcontractor to McDonnell. Declaratory and damage relief would have no less impact on the Government's rights and interests than the injunctions, in fact, requested

(See p. 3, *supra*). As Northrop argued to the District Court, "The Government . . . could not override a simple declaration of rights under the parties' contracts, or an award of damages [or] fair market value."

The Ninth Circuit's conclusion makes a mockery out of the Government's rights. If McDonnell were required to pay Northrop for use of the Government's "unlimited rights" data, McDonnell would be deterred from using the data. This would impact the Government's costs either (a) due to loss of the Government's paid-for McDonnell production efficiencies, which Northrop acknowledges in seeking to justify restraints to overcome its resulting price disadvantage,[10] or (b) because McDonnell could afford to use the data only if the Government paid the costs incurred by McDonnell for its use.[11]

Such results would inevitably prejudice the Government's rights and violate the policies stated in (a) DAR 9-201(d), which defines the Government's "unlimited rights" in data, (b) DAR 9-301.2 which, reflecting such rights, states that the Government should not pay for the use of data in which the Government has acquired "unlimited rights," and (c) DAR 4-117 which precludes teaming arrangements that "limit the Government's

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[10] The Government also would be exposed to multiple tooling, facilities, and similar costs. Further, to the extent of lost sales to foreign customers due to such a price disadvantage, the Government would lose not only the benefit to it of higher production rate efficiencies, but also the research and development recoupment charges which such foreign customers would pay (DAR 1-2403 and 6-1306).

[11] Such costs would be allowable costs under DAR Section XV, and the Government would be required, depending on the contract type, either to reimburse McDonnell for the costs or, at least prospectively, to include the costs in its contract price. In any event, if the Government elected to require McDonnell's production of an F-18 contrary to Northrop's claims, it would be obligated to indemnify McDonnell. 50 U.S.C. App. § 2071; 15 C.F.R. Part 350, § 24. The Government could also face liability to Northrop under 10 U.S.C. § 2273 and under 22 U.S.C. § 2356, as the District Court and Ninth Circuit respectively concluded. 498 F.Supp at 1118-1119; 705 F.2d at 1040.

rights" to "provide the selected prime contractor with data rights owned or controlled by the Government."[12]

Furthermore, if a judgment was rendered as requested by Northrop, McDonnell would be subjected to the risk of incurring double or otherwise inconsistent obligations by reason of the Government's "unlimited rights" in the F-18. Under the "Changes" clauses mandated by DAR[13] in existing and future contracts, the Government has the right to direct changes in the configuration of F-18's being produced by McDonnell. Thus, McDonnell would be subject to an order precluding it from making changes inevitable in the evolution of an air weapons system over its useful life,[14] and obligated to the Government to make such changes.

Having avoided an analysis of Rule 19(b) by finding that the tests of 19(a) were not met, the Ninth Circuit did not discuss the tests of Rule 19(b). The District Court analyzed these tests, found that the factors of Rule 19(b) were met, and

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[12] Unquestionably, the Government's rights and interests are more directly and seriously threatened in this case than they were in *Franz* v. *East Columbia Basin Irrigation District*, 383 F.2d 391 (9th Cir. 1967) (United States indispensable to a suit by a private owner of land in Irrigation District complaining he was not allowed to withdraw land from District, the court stating "if [plaintiff is] allowed to withdraw [his land] from the Irrigation District, the financial solvency of the project will be threatened and the chances of repayment to the United States of money invested in the project will be damaged"); *Carlson* v. *Tulalip Tribes of Washington*, 510 F.2d 1337 (9th Cir. 1975) (Government indispensable to a private couple's suit to quiet title in their land against claims by an Indian tribe); or *Blake Construction Co.* v. *American Vocational Ass'n*, 419 F.2d 308 (D.C. Cir. 1969) (Government indispensable to a suit by a construction company seeking to impress a trust on funds received by another contractor from the GSA).

[13] *See, e.g.*, 7-103, 7-103.2, 7-203 and 7-203.2.

[14] *E.g.*, the F-4 Phantom originated as a Navy fleet defense fighter, but became a tactical fighter/bomber, with mission oriented changes. Here, for example, for cost or weight-saving mission purposes, the Government could well direct McDonnell to delete from some U.S. Navy F-18's any number of features, such as the bolt-on/bolt-off launch bar used for carrier take-offs, not required for U.S. Marine Corps shore-based uses.

correctly determined that the Government was an indispensable party. (*See* Conclusions of Law 9-26, App. pp. 101a-108a.)

To correct the misapplication of Rule 19 and the prejudice to the Government's rights created by the Ninth Circuit's opinion, this Court should review it and reinstate the District Court's decision.

III. The Ninth Circuit's Decision That The Political Question And Act-Of-State Doctrines Are Not Applicable To This Dispute Over Who Can Produce And Sell F-18's Conflicts With This Court's Decision In *Gilligan* v. *Morgan*, 413 U.S. 1 (1973), And The Second Circuit's Decision In *Hunt* v. *Mobil Oil Corp.*, 550 F.2d 68 (1977).

Judicial determination of Northrop's contract, tort, attempt to monopolize and unfair competition claims over who can produce and sell which configurations of the F-18, to which military services of the Government and to which of its allies, and whether McDonnell attempted to monopolize will necessarily entangle the Judicial Branch in national defense and foreign policy matters, including the motivations for military procurement decisions of the Government and of foreign states, matters committed to the Legislative and Executive Branches of the United States Government under Art. I § 8, Cls. 12, 13, 14 and 16 and Art. II, § 2, of the Constitution.

The Political Question

As this Court in *Gilligan* v. *Morgan*, 413 U.S. 1, 10-11 (1973) stated:

> [I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches. . . . It is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system;

the majority opinion of the Court of Appeals failed to give appropriate weight to this separation of powers.

The all pervasive direct and ultimate control by the Government as the sole domestic buyer and the sole arbiter of foreign sales and seller of all Foreign Military Sales ("FMS sales")[15] distinguishes this dispute, only "cosmetically . . . a dispute between private parties" as found by the District Court (498 F.Supp at 1117), from the mere "private commercial activity which the judiciary is uniquely equipped to resolve" seen by the Ninth Circuit (705 F.2d at 1047).

Contrary to the Ninth Circuit's statement, the District Court identified *all* of the factors in *Baker* v. *Carr*, 369 U.S. 186 (1962) as applicable to Northrop's claims and McDonnell's defenses. With no recognition or discussion of the voluminous uncontroverted record of Government control and decisions affecting Northrop's sales efforts, the Ninth Circuit simplistically concluded that it discerned "no support for characterizing Northrop's claims as political questions. . . ." 705 F.2d at 1047, App. p. 27a. The Ninth Circuit's error proceeded from its failure to recognize the scope and significance of the Government's "unlimited rights" and the record of the extent to which the Government has and in the future may exercise these rights through military procurement decisions.

In attempting to distinguish *Gilligan*, the Ninth Circuit focused solely on alleged activity by McDonnell as private commercial conduct "neither authorized nor directed by . . . the Government." 705 F.2d at 1047. It failed, however, to comprehend that, *as pleaded* by Northrop (see note 18, *infra*), it could not have been McDonnell's alleged misconduct which may have caused Northrop's alleged injury. Any injury was caused by the decisions of our Government, including the Congressional NACF technology directive, the DOD and Navy's teaming request, the Air Force's selection of the F-16 over the F-17, the Navy's selection of the F-18 and of McDonnell as its

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[15] *See, e.g.*, Conclusions of Law 1, 9, 34-37, 63, App. pp. 99a, 101a, 110a-111a, 117a.

prime contractor, the Government's decision not to procure either the F-17 or an F-18L for its use, the Government's determination of the allies to which F-18L's could and could not be offered or sold—together with the decisions of allies not to procure an F-18L.

These and other military procurement decisions of the Legislative and Executive Branches must of necessity be examined by the judiciary if Northrop is to establish the fact and amount of injury *and* if McDonnell is to defend itself against Northrop's claims.

By concluding that Northrop's "claims" are not "political questions," thus failing to recognize that it is the *ultimate issues to be resolved* that are "political questions," the Ninth Circuit has entered the thicket of *Baker* v. *Carr* and impermissibly catapulted the judiciary into the arming and equipping of our armed forces and those of our allies, in conflict with the dictates of *Gilligan* v. *Morgan*, 413 U.S. 1, at 10-13 (1973), that such matters are non-justiciable political questions.

Act-of-State Doctrine

Given the uncontroverted record before it, the Ninth Circuit's ruling that the act-of-state doctrine is not applicable to this suit cannot be reconciled with the Second Circuit's ruling in *Hunt* v. *Mobil Oil Corp.*, 550 F.2d 68 (1977), which held that even though a party does not challenge the foreign act itself, if inquiry into the motivations or reasons for the act is necesary, then the suit is barred. Significantly, the Ninth Circuit opinion fails to even mention *Hunt*.

Like plaintiff in *Hunt*, Northrop contended below that it does not challenge the foreign state's procurement decisions, but only that such decisions were, and will be, induced by alleged conduct of McDonnell. The Ninth Circuit's view that it will not be necessary to inquire into foreign decisions to determine the causal effect of the alleged activity was pointedly rejected by *Hunt*:

> It is well established that a private plaintiff who seeks damages in an antitrust action must allege and establish that his business or property was injured as a direct result of the Sherman Act violation. 550 F.2d at 76.[16]

Faced with allegations strikingly similar to Northrop's here, the court in *General Aircraft Corp.* v. *Air America, Inc.*, 482 F. Supp. 3, 6-7 (D.D.C. 1979), following *Hunt*, held:

> [W]here the injury complained of results directly from the acts or decisions of a foreign sovereign and only indirectly from defendants' allegedly unlawful anti-competitive activities, the Court must dismiss the claims. . . . The motivation underlying purchasing decisions made by foreign governments is an essential issue raised by the pleadings. . . .

See also Bokkelen v. *Grumman Aerospace Corp.*, 432 F. Supp. 329, 333 (E.D.N.Y. 1977), which also followed *Hunt*.

Northrop admits, and the District Court and Ninth Circuit found, that military procurement decisions of foreign sovereigns are acts of state. The Ninth Circuit, but not the District Court, chose to ignore that, *as pleaded*, Northrop must demonstrate that its business was damaged as a result of these decisions of foreign states not to purchase an F-18L and that it was the alleged misconduct of McDonnell which directly or indirectly wrongfully caused these decisions. *Radiant Burners, Inc.* v. *Peoples Gas Light and Coke Company*, 364 U.S. 656, 660 (1961); *Salerno* v. *American League of American Baseball Clubs*, 429 F.2d 1003, 1004 (2d Cir. 1970). McDonnell, in defense, has the right to demonstrate that its conduct,

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[16] *Hunt* also rejected the Ninth Circuit's approach here, that since Northrop seemingly has stated a claim, whether or not it can ultimately prove a causal connection, dismissal prior to trial is inappropriate. *Hunt* noted that there could be no antitrust liability attributed to defendants unless plaintiff could prove that, *but for* the challenged activity, Libya would not have moved against it, and, thus, the act-of-state doctrine was inescapably raised by the pleadings and would be considered on a motion to dismiss. 550 F.2d at 76.

whether or not wrongful, did not influence and cause these decisions.[17]

The Ninth Circuit further chose to ignore that, in requiring a rule-of-reason analysis under Section 1 of the Sherman Act and in disregarding the Government's control of the market, the judiciary will be required to examine the military aircraft industry of the free world, and in that context to define the relevant product and geographic markets and measure the reasonableness of Northrop's alleged restraints and McDonnell's power to monopolize. Such an examination in turn will require analysis of the air weapons acquisition process of the United States and its allies, their defense requirements (including present inventory mix, mission requirements, and projected inventory requirements), internal political forces, foreign policies, industrial base, technical and financial capabilities, and their coproduction and offset requirements and demands. It will also require examination of the negotiations and deliberations of the United States with those foreign allies respecting these highly sensitive matters relating to the sale of the F-18 as an instrument of U.S. foreign policy.

Examination of these issues raises insurmountable problems of discovery and proof, including securing this highly sensitive evidence and testimony.

If the Ninth Circuit's decision is permitted to stand in conflict with *Hunt* v. *Mobil Oil Corp.*, *supra*, judicial examination into these motivations and acts and policies of our allies in eliminating F-18L's from their consideration must necessarily commence upon remand.

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[17] The Ninth Circuit dealt too simplistically with its own decision in *Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976). It based its opinion on superficial distinctions, such as whether Northrop sought relief against any sovereign state (705 F.2d at 1049) instead of whether, as here, a decision in the case will have "the potential for interference with our foreign relations" (549 F.2d at 607), in which circumstance the judiciary must abstain from further inquiry.

IV. A Prime Contractor Cannot Unlawfully Attempt To Monopolize A Military Air Weapons System Market In Which The Production, Sale, Purchase And Use Of The Product Is Controlled By The U.S. Government.

Northrop sought below to elevate contract, tort and unfair competition allegations against McDonnell to the level of an attempted monopolization claim sufficient to withstand a summary judgment motion.[18] Accepting, *arguendo*, that the acts alleged to be predatory actually occurred, given the Government's pervasive control, no market encompassing the F/A-18A and its variants[19] could be "monopolized" as that term has been defined by this Court.

The District Court correctly addressed this issue when it stated:

> The United States Government has the absolute and overriding control of both the production and sales potential of the product that brings these parties into vitriolic conflict. . . . The United States Government *is the market* concerned with production and distribution of weapons systems for governmental military establishments. . . . The United States Government also makes the world market. No single group of producers has any power to expand a market share beyond that considered by the United States Government in the implementation of domestic defense and foreign policy which is in the best interest of its citizens.

498 F. Supp. at 1123, App. pp. 72a-73a.[20]

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[18] In its attempt to cast McDonnell in the role of a predator, Northrop in its Brief before the Ninth Circuit raised additional allegations of conduct (e.g., boycott, withholding of data) which neither appear in its Amended Complaint nor arise from it by fair implication.

[19] Northrop has alleged that the "F/A-18A and F-18L constitute a relevant submarket for the purposes of Section 2 of the Sherman Act. . . ." Amended Complaint ¶ 81, App. p. 166a. McDonnell has accepted this market definition for purposes of disposition of its motions to dismiss and for summary judgment only.

[20] *See also* Findings of Fact 50-58, App. pp. 96a-99a; Conclusions of Law 63-67, App. pp. 117a-119a.

The effect of this Governmental control in the market for advanced weapons systems is widely acknowledged: "In order to understand the economic operations of the U.S. defense industry, it is first absolutely essential to recognize that there is no free market at work in this area and that there likely cannot be one because of the dominant role played by the federal government." J. Gansler, *The Defense Industry* 69 (1980).[21] As noted in the recent book describing the ACF competition and the selection of the F-16 over Northrop's proposed F-17 by the U.S. Air Force and the European Consortium nations: "No free markets exist in this milieu, there is usually only one customer, price competition is often irrelevant, the government bureaucracy is stifling." I. Dörfer, *Arms Deal, The Selling of the F-16* xv (1983). As put in *Arms Transfers in the Modern World* 207 (S. Newman & R. Harkavy, eds. 1979): "Fighter planes are not made in heaven, but in Congress."

Because of the overarching control exercised by the Government, no seller of an advanced air weapons system can attain monopoly power,[22] a necessary element of the offense of

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[21] For similar views, *See* M. Peck & F. Scherer, *The Weapons Acquisition Process: An Economic Analysis* 57-60 (1962); J.R. Fox, *Arming America: How the U.S. Buys Weapons* 37-39, 385 (1974).

[22] "Monopoly power" has been defined by this Court as "the power to raise prices or exclude competition" in the relevant market. *United States* v. *E.I. Du Pont De Nemours & Co.*, 351 U.S. 377, 391 (1956). The term is frequently used interchangeably with "market power," which is defined as "the ability to raise price by restricting output." II P. Areeda & D. Turner, *Antitrust Law* ¶ 501 (1978).

McDonnell does not possess the actual or threatened ability to raise prices for the F-18 by limiting the quantity produced. Northrop and the Ninth Circuit recognized that, McDonnell could not exclude competition by preventing the Government from purchasing the F-18 (for itself or for foreign purchasers) from any source the Government designated. 705 F.2d at 1045. Northrop's claims of threatened unlawful exclusion from the market by McDonnell are particularly incredible in light of the fact that Northrop is performing more than a 40% workshare in F-18's built by McDonnell as prime contractor.

monopolization.[23] And in a market where the completed offense of monopolization could not occur, it is axiomatic that unlawful *attempted* monopolization cannot be established either.[24]

Under this Court's prior holdings, proof of three factors is necessary to establish attempted monopolization: (1) a specific intent to monopolize; (2) predatory or anticompetitive conduct or acts engaged in to further that intent; and (3) a dangerous probability that the defendant would, if its acts were successful, achieve monopoly power.[25] Logically, establishing this final "dangerous probability" element requires a showing that the defendant presently possesses, in a relevant market, a power proximate to monopoly power—a showing which has not and cannot be made here.

The dangerous probability requirement first articulated in *Swift*, has been followed consistently by this Court and by all circuits,[26] save one—the Ninth. Application of the requirement has been exceptionally controversial within that circuit. 705 F.2d at 1058. Although some Ninth Circuit decisions have employed the classic formulation,[27] others have drastically departed from its standards. In a widely-criticized line of cases commencing with *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459 (9th Cir. 1964), *cert. denied*, 377 U.S. 993 (1964), some Ninth Circuit decisions have completely dispensed with the danger-

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[23] *E.g.*, *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570 (1966).

[24] McDonnell does not argue that the defense industry is immune from antitrust scrutiny. It simply asserts that the elements of a Section 2 violation have not and cannot be established in this particular instance.

[25] *Swift & Co.* v. *United States*, 196 U.S. 375 (1905). *See also*, *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951); *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946).

[26] *See* Handler & Steuer, *Attempts to Monopolize and No Fault Monopolization*, 129 U.Pa.L.Rev. 125, 128-29 (1980).

[27] *See, e.g.*, *Cornwell Quality Tools Co.* v. *C.T.S. Co.*, 446 F.2d 825 (9th Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972); *Wisdom Rubber Indus., Inc.* v. *Johns-Manville Sales Corp.*, 415 F. Supp. 363 (D. Hawaii 1976).

ous probability requirement.[28] A third line of authority within the circuit, while purporting to impose the traditional standard, permits a dangerous probability to be inferred from specific intent, which in turn can be inferred from conduct.[29]

The Ninth Circuit below attempted to sidestep this conceptual morass by finding that "there was sufficient evidence of McDonnell's probability of success to avoid summary judgment." 705 F.2d at 1058. But since it failed to explain how McDonnell could possess the power to monopolize the Government-controlled market, its holding that Northrop has established a *prima facie* attempted monopolization claim can only be supported by either dispensing with the dangerous probability requirement completely or by inferring its existence. The flaw in such an approach in this instance is evident. The Ninth Circuit's decision is thus in conflict with the teachings of this Court and with sound antitrust policy.[30]

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[28] *E.g., Greyhound Computer Corp.* v. *IBM*, 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978); *Knutson* v. *The Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977).

[29] *E.g., Twin City Sportservice, Inc.* v. *Charles O. Finley & Co.*, 676 F.2d 1291 (9th Cir.), *cert. denied*, 103 S.Ct. 364 (1982); *Janich Bros.* v. *American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978). When so inferred, "dangerous probability in effect is conclusively presumed—in other words, dispensed with." Handler & Steuer, *Attempts to Monopolize and No Fault Monopolization*, 129 U. Pa. L. Rev. 125, 157-58 (1980).

[30] As Don T. Hibner, Jr., co-counsel below for Northrop, warned in a 1967 article:

> When a court [in an attempted monopolization case] either allows a very narrow market definition, or dispenses with market analysis altogether, the advantages to a treble damage plaintiff are almost without dimension:
>
> . . . (e) Any business tort, whether unfair competition or trade libel, can be pleaded as an attempt to monopolize case, and treble damages sought.

Hibner, *Attempts to Monopolize: A Concept In Search of Analysis*, 34 Antitrust L.J. 165, 168-69 (1967). This approach "should be disturbing not only to defense oriented antitrust lawyers, but to antitrust scholars as well." *Id.* at 171.

Moreover, the decision is particularly distressing in that it would unnecessarily require a trial of meritless claims. In the words of one recent commentary:

> Almost without exception, when courts have ruled in favor of plaintiffs in the Ninth Circuit, it has been only to deny or reverse a summary determination and to require further proceedings. It is the ten other circuits that have expedited litigation, by refusing to entertain attempted monopolization claims when it is clear that no dangerous probability exists. Handler & Steuer, *supra* note 26 at 163.

This case, then, presents the Court with the opportunity to correct a serious and potentially costly error and to provide much-needed guidance to the lower courts and the business community on the law of attempted monopolization and the dangerous probability requirement, which the Court has not substantively analyzed in over thirty years.[31] The public interest would be well-served by the Court's consideration of this important issue in the context of a dispute affecting the availability of an advanced air weapons system vital to our national defense and foreign policy.

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[31] "What is needed today is clarification, to assure that [the dangerous probability] requirement is preserved and to correct the disarray caused by the Ninth Circuit rulings. . . . [T]he resulting uncertainty should be allayed as soon as possible." Handler, *Reforming the Antitrust Laws*, 82 Col. L. Rev. 1287, 1353 (1982).

V. Conclusion

For the reasons stated herein, this Court should grant the Petition for Certiorari, reverse the opinion of the Ninth Circuit and reinstate the District Court's decision.

Respectfully submitted,

GEORGE S. HECKER
(Counsel of Record)
CHARLES A. WEISS
E. PERRY JOHNSON
DANIEL C. SCHWARTZ
BRYAN, CAVE, MCPHEETERS & MCROBERTS
500 North Broadway
St. Louis, Missouri 63102
(314) 231-8600
Attorneys for Petitioner

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